

CC Docket #96-88
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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AUG 12 1998

In the matter of)
)
Request of Association for Local) CPD 97-30
Telecommunications Services for)
Clarification of the Commission's Rules)
Regarding Reciprocal Compensation for)
Information Service Provider Traffic)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF COX COMMUNICATIONS, INC.

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July 17, 1997

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SUMMARY

The Commission should act expeditiously to grant the ALTS Request. Incumbent LECs are abusing their continuing monopoly power to attempt to avoid paying reciprocal compensation on traffic to Internet service providers even though the law and their own interconnection agreements require them to do so.

Commission action is important because ALTS has identified a widespread and serious problem. Cox has experienced incumbent LEC efforts to avoid paying compensation for calls to Internet service providers, although its interconnection agreements do not exempt Internet traffic from reciprocal compensation and although, in one case, the incumbent LEC used Internet traffic as an example of local traffic during its arbitration with Cox. If these incumbent LEC efforts succeed, they will damage local competition and turn Internet service providers into a disfavored class of local telecommunications customers. Bell company efforts to avoid paying compensation also raise serious issues under Section 271.

The Commission also should grant the ALTS Request because there is no basis for any other decision. Calls to Internet service providers within a caller's local calling area indisputably are local calls. The "ESP Exemption," only prevents LECs from imposing access charges on enhanced service providers, and does not turn these local calls into interexchange calls. There is no reason to treat calls to Internet service providers any differently than myriad other calls with similar characteristics. Finally, it would be commercially unreasonable to require LECs to distinguish between calls to Internet service providers and other types of calls.

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COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc. ("Cox"), by its attorneys, hereby submits these comments in response to the Commission's *Public Notice* in the above-referenced proceeding.^{1/} For the reasons described below, Cox urges the Commission to grant the ALTS Request expeditiously to remove the uncertainty caused by incumbent LECs' unjustified claims, contrary to the 1996 Act, Commission Rules and existing interconnection agreements, that they need not pay terminating compensation for calls to Internet service providers.

I. Introduction

Cox is one of the largest cable operators in the country, with major clusters of systems in seven states. Cox is committed to providing competitive local exchange services throughout the areas served by these clusters and, in fact, Cox affiliates have been certificated to provide local exchange services in each of those seven states. Cox already has

^{1/} See "Pleading Cycle Established for Comments on Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic," *Public Notice*, CCB/CPD 97-30, rel. Jul. 2, 1997 (the "*Public Notice*").

begun to provide local exchange services in California and has an aggressive schedule to begin offering those services in its remaining clusters.

As part of its effort to enter the local exchange market, Cox has negotiated and arbitrated interconnection agreements with incumbent LECs across the country. None of the agreements that Cox has reached contains any special provisions or exceptions for local traffic terminated to customers that happen to be Internet service providers. Nevertheless, and as described in more detail below, Cox already is experiencing incumbent LEC efforts to avoid paying compensation for local traffic that is directed to those customers.

Cox's experiences, along with the experiences described in the ALTS Request, lead to the conclusion that incumbent LECs simply are trying to avoid their plain obligations under their existing interconnection agreements. The reason LECs are doing so is that they have lost Internet service providers as local customers and they wish unlawfully to deny competitive LECs the compensation they earn for carrying incumbent LEC-originated traffic to those customers. The very fact that the incumbent LECs even are attempting to avoid paying this compensation demonstrates their sweeping monopoly control over the local exchange and their continuing willingness to use this market power to thwart the development of competition. Indeed, if the situation were reversed, there is no doubt that the incumbent LECs would insist on "full" compensation for their costs of terminating traffic. To prevent the incumbent LECs from further abusing their monopoly power, the Commission should grant the ALTS Request.

II. ALTS Has Identified a Serious and Widespread Problem.

The problems identified by ALTS would be serious if they were just the actions of one incumbent LEC in one state. In reality, incumbent LEC refusal to pay terminating compensation on calls to Internet service providers is a widespread problem that has emerged with "coincidental" coordination and has been encountered by competitive LECs across the country. In Cox's case, incumbent LECs have announced their position only after negotiations or arbitrations for interconnection agreements have been completed.

Cox's experience is illustrative.^{2/} Cox entered into negotiations with Bell Atlantic for an interconnection agreement in Virginia in 1996. During those negotiations, Cox sought bill and keep arrangements, but Bell Atlantic insisted that any agreement had to include monetary compensation for termination of local traffic. Cox's request for interconnection subsequently went to arbitration. During the arbitration hearing, Bell Atlantic's counsel and witness used traffic terminated to Internet service providers as an example of local traffic for which compensation should be required.^{3/} After an arbitration decision (which does not contain any provisions exempting Internet traffic from reciprocal compensation obligations) was reached, Cox and Bell Atlantic held a meeting to discuss provisioning requirements. During that meeting, Cox described its expectation that it would have one or more Internet service

^{2/} This experience is described in more detail in a recent Cox filing in Virginia seeking enforcement of its interconnection agreement with Bell Atlantic. A copy of that filing is attached hereto as Exhibit 1.

^{3/} See Exhibit 1 at 13-17. Ironically enough, Bell Atlantic used the example of Internet traffic to explain why it believed bill and keep compensation was inappropriate.

providers as customers. Bell Atlantic did not indicate any intention to treat that traffic as anything other than local traffic at that time.^{4/} Cox's final agreement with Bell Atlantic also does not contain any language that would exclude traffic to Internet service providers from reciprocal compensation.^{5/} Months later, Bell Atlantic, acting unilaterally, decided that it would not treat traffic originating in a local calling area and directed to Internet service providers as local traffic for the purpose of terminating compensation.^{6/} This new position, which was inconsistent with Bell Atlantic's earlier position, also is inconsistent with a recent Bell Atlantic Comparably Efficient Interconnection filing with this Commission, in which it explained that its own Internet service would be provided via regular business lines and would be reached via local calls from its customers.^{7/}

Moreover, Bell Atlantic is not the only incumbent LEC taking this position in its dealings with Cox. Pacific Bell recently informed Cox that it does not wish to pay terminating compensation for calls to Internet service providers. Again, there is no language in the proposed Cox-Pacific Bell agreement (which is the subject of arbitration on other issues) that would permit either party to exempt any traffic terminating to a local number

^{4/} *Id.* at 17-18, Attachment 3.

^{5/} *Id.* at 6.

^{6/} *Id.* at 6, Attachment 1.

^{7/} See Amendment to Bell Atlantic CEI Plan to Expand Service Following Merger with NYNEX, CCB Pol. 96-09, filed May 5, 1997, at 3 ("For dial-up access, the end user will place a local call to the Bell Atlantic Internet hub site," and "Bell Atlantic's vendor will subscribe to local telephone services . . . to receive the call"). A copy of the amendment is attached hereto as Exhibit 2.

from terminating compensation. There certainly is no language allowing the segregation of an entire class of customers.

What is particularly disturbing about incumbent LEC claims that the reciprocal compensation requirement does not apply to traffic to Internet service providers is that they are making those claims regardless of the terms of both their voluntary and arbitrated interconnection agreements with competitive LECs and regardless of the state of law and policy on this point. In Bell Atlantic's case, it had acknowledged during its arbitration with Cox that calls to Internet service providers are local calls and then appeared to change its mind after realizing that Cox was likely to attract Internet service providers as customers. As described in the ALTS Request, NYNEX has been even more egregious in attempting to impose its position on competitive LECs, and actually sent a letter threatening not to pay *any* terminating compensation unless competitive LECs agreed to waive their right to compensation for calls to Internet service providers.^{8/} This use of force to amend interconnection contracts is ample demonstration of continuing LEC market power.

The incumbent LEC efforts to deny compensation for traffic routed to Internet service providers, if successful, could have serious consequences for competitive LECs and for Internet service providers. If compensation is not available for calls to those customers, competitive LECs will lose important revenues that they otherwise would expect to receive

^{8/} See ALTS Request at 4. The New York Public Service Commission has informed NYNEX that it does not concur in NYNEX's interpretation of the reciprocal compensation requirement. See *id.* at Attachment 1.

under the current regulatory regime.^{9/} At the same time, if one type of customer can be exempted from the reciprocal compensation obligation, then there will be considerably less certainty about when the reciprocal compensation obligation should be applied in other circumstances.

In addition, the incumbent LEC position, if adopted, would force competitive LECs to bear the costs of terminating calls to Internet service providers without compensation. Incumbent LECs have long asserted, and the Commission has found, that there are costs associated with terminating traffic, for both incumbents and competitive LECs, that must be compensated. Much as incumbent LECs have claimed that bill and keep arrangements for all calls would be unfair because they incur costs to terminate calls, denying compensation for calls to Internet service providers would be unfair because it would prevent competitive LECs from recovering their costs. Indeed, denying compensation for calls routed to specific types of customers would be particularly unreasonable because it would constitute a determination that some calls are more worthy of compensation than others.^{10/} It also is plainly contrary to the requirements of Section 252(d)(2)(A)(i), which expressly provides for

^{9/} Cox continues to support bill and keep compensation arrangements so long as they apply to all local traffic.

^{10/} It should be noted that this issue is different from the issue of whether an Internet service provider should pay access charges rather than local business rates. The most notable difference is that LECs do receive compensation from their Internet service provider customers in the form of payments for the local service purchased by the Internet service provider and by the customers who call the Internet service provider.

the recovery of compensation for "calls that originate on the network facilities of the other carrier."¹¹

Denying compensation for calls to Internet service providers also would ghettoize them into less desirable customers for all LECs. Internet service providers normally would be highly desirable customers because they are growing quickly and they need more advanced services than the average customer. If terminating compensation is not available for Internet traffic, no LEC will have an incentive to seek out Internet service providers because it will be difficult to recoup the costs of serving those customers.

Incumbent LEC efforts to deny compensation for Internet traffic also violate their interconnection agreements. Simply put, the terms of existing interconnection agreements do not permit the parties to exclude Internet traffic from the reciprocal compensation obligation. Almost every interconnection agreement contains a detailed description of what traffic is and is not local traffic subject to Section 252(d)(2) reciprocal compensation; those descriptions do not include traffic to Internet service providers among the types of calls that are not local in nature. Rather, agreements typically provide that any call originated by one carrier and terminated to a customer of the other carrier within the specified local calling area will be treated as a local call. Cox is unaware of *any* agreement that contains an exclusion from reciprocal compensation based on the end user to which the traffic is terminated, let alone an agreement that specifically excludes traffic to Internet service providers. Because these provisions, almost without exception, were drafted by the incumbent LECs and because incumbent LECs rarely, if ever, acceded to any material changes in these provisions, they

¹¹/ 47 U.S.C. § 252(d)(2)(A)(i).

are not now in any position to unilaterally adopt new interpretations that are contrary to the plain language that they insisted upon. Indeed, it would be unconscionable to permit such a result.

The unilateral attempts of several Bell Operating Companies to avoid paying compensation for local calls terminated to Internet service providers also raise serious issues under Section 271 of the Communications Act. A Bell company seeking interLATA authority is required to pay compensation for terminating traffic under Section 271(c)(2)(B)(xiii) "in accordance with the requirements of Section 252(d)(2)," and is required to "fully implement" the checklist items to qualify for interLATA authority under Section 271(d)(3)(A)(i).^{12/} Refusal to pay compensation for traffic directed to certain customers violates both of these obligations and a BOC's violation of its interconnection agreement by failing to pay compensation for traffic covered by the agreement is an independent violation of the requirement to fully implement the checklist. The Bell companies' unilateral decisions not to pay compensation also raise significant questions about abuse of their monopoly power, which must be considered in the Commission's public interest analysis under Section 271(d)(3)(C) and in the Justice Department's evaluation under Section 271(d)(2)(A).

III. There Is No Legal or Policy Basis for the Incumbent LEC Effort to Avoid Paying Compensation on Calls to Internet Service Providers.

While incumbent LECs have asserted a variety of grounds for refusal to pay compensation for calls to Internet service providers, none of these grounds has any sound basis in fact or law. As shown below, calls to Internet service providers fall squarely within

^{12/} 47 U.S.C. § 271(c)(2)(B)(xiii), (d)(3)(A)(i).

the definition of local calls, and the enhanced service provider exemption from access charges (the "ESP Exemption") does not immunize LECs from paying terminating compensation. Moreover, there is no reason to treat calls to Internet service providers differently than calls to other local customers. Indeed, calls to Internet service providers within a caller's local calling scope fall squarely within the definition of local calls eligible for terminating compensation under the Commission's Rules.^{13/}

First, there can be little question that calls to Internet service providers with numbers within the caller's local calling scope are, in fact, local calls. This is obvious on the most basic level: The calls terminate to a local number. That local number typically is associated with a standard business line or some other form of local telephone service. Once the call reaches that local number, it leaves the public switched telephone network (unlike, for instance, calls that are routed to a long distance carrier). In practice, the terminating carrier has no idea what happens after the call reaches the Internet service provider, and there are many possibilities, some of which involve only local transmission, some of which require interaction with stored information, and some of which require long distance communications.^{14/} Thus, the nature of the transaction between the LEC and the Internet service provider does not provide any basis for treating calls to the Internet service provider any differently than calls to other local customers.

^{13/} See 47 C.F.R. § 51.701(b).

^{14/} For instance, a customer who retrieves e-mail interacts with information that may be stored on a local server or at a distance from the caller's location. When the customer sends e-mail, it may be transmitted immediately or stored locally for later transmission, depending on how the Internet service provider has configured its operations.

The ESP Exemption also does not provide a basis for treating calls to Internet service providers differently from other local calls. Although some LECs have argued that the exemption implicitly requires calls to Internet service providers to be treated as access calls, that is not the case. Contrary to the LECs' assertions, the exemption governs only the relationship between a LEC and an ESP that is the LEC's own customer; it says nothing about the relationship between that LEC and other LECs. In addition, the exemption specifically contemplates that enhanced service providers, including Internet service providers, can obtain service by buying ordinary business lines, subject only to the normal terms and conditions for those lines. The ESP exemption does not place any additional conditions on the use of those lines. In fact, incumbent LECs treat calls within the local calling scope to their own Internet service provider customers as local for billing purposes. Equally important, the determination that LECs cannot impose access charges on enhanced service providers never has been interpreted to suggest that carriers cannot recover their costs through the other mechanisms that normally would be available to them, including basic charges for exchange services and terminating compensation for calls to an enhanced service provider's line.

In addition, comparison with other traffic that plainly is eligible for reciprocal compensation shows that there is no reason to treat traffic terminating to Internet service providers any differently. There are, for instance, many customers that generate more incoming calls than outgoing calls. These customers include pizza makers, messenger services and theater ticket offices, among many others. Incumbent LECs have not argued that calls to these customers should not be subject to compensation obligations. There also

are many calls that, like Internet access, generate additional transmissions after the initial call is completed. These include calls to leaky PBXs, follow-me roaming services offered by CMRS providers and calls to call centers that sometimes forward traffic to other locations for further processing. Again, incumbent LECs have not suggested that these classes of calls should be excluded from compensation obligations.

Finally, the Commission should recognize that it would be commercially unreasonable to require LECs to attempt to distinguish between calls that are routed to the Internet and calls that are not. As noted above, there is no way to tell if a call to an Internet service provider is entirely local or results in communications outside the local calling area. For that matter, there is no way to tell if a particular number assigned to an Internet service provider is used for customer service, for ordering Internet access or for access to the Internet.^{15/} Indeed, as cases involving non-commercial computer bulletin board services have demonstrated, it often is difficult or impossible to tell how a customer is using its telephone service without having the customer supply that information. Obtaining that information is likely to be difficult and would require LECs to ask their customers intrusive questions that those customers might not be willing to answer. Thus, even if the Commission were to agree that Internet traffic should not be subject to compensation obligations, it would have to recognize that there is no way to make the determinations necessary to exclude that traffic from compensation determinations.

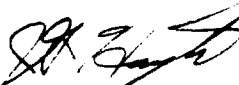
^{15/} In practice, a customer service number could well exhibit calling patterns that are extremely similar to those of a number used for Internet access.

IV. Conclusion

For all these reasons, Cox Communications, Inc., respectfully requests that the Commission act expeditiously on the ALTS Request in accordance with these comments.

Respectfully submitted,

COX COMMUNICATIONS, INC.

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July 17, 1997

Exhibit 1

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

Petition of

COX VIRGINIA TELCOM, INC.,

v.

Case No. PUC97 _____

BELL ATLANTIC-VIRGINIA, INC.,

**For enforcement of interconnection agreement and
arbitration award for reciprocal compensation for
the termination of local calls to Internet service providers.**

**PETITION OF COX VIRGINIA TELCOM, INC.
FOR ENFORCEMENT OF INTERCONNECTION
AGREEMENT AND ARBITRATION AWARD FOR
RECIPROCAL COMPENSATION FOR THE TERMINATION
OF LOCAL CALLS TO INTERNET SERVICE PROVIDERS**

Following the Commission's Arbitration Decisions,¹ Cox² and Bell Atlantic entered into an interconnection agreement³ that requires each party to be compensated by the other for the completion of all local calls that originate on the other's network. Bell Atlantic recently has informed Cox that under its interpretation of the Agreement, local calls to Internet service providers are excluded from this compensation regime. Bell Atlantic is incorrect. Completion of local calls to Internet service providers is included in this reciprocal compensation regime.

¹ *Petition of Cox Fibernet Commercial Services, Inc. For arbitration of unresolved issues from interconnection negotiations with Bell Atlantic-Virginia, Inc. pursuant to § 252 of the Telecommunications Act of 1996*, Order Setting Proxy Prices and Resolving Interim Number Portability, Case No. PUC960104 (November 8, 1996); Order Resolving Remaining Arbitration Issues and Requiring Filing of Interconnection Agreement (November 8, 1996); Order Resolving Wholesale Discount For Resold Services (November 8, 1996); Amending Order (November 13, 1996); and Amending Order (January 27, 1997) (collectively, the "Arbitration Decisions").

² Cox Virginia Telcom, Inc., formerly known as Cox Fibernet Commercial Services, Inc., changed its corporate name on March 21, 1997.

³ Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 (dated as of February 12, 1997) between Bell Atlantic-Virginia, Inc. and Cox Fibernet

Accordingly, Cox seeks an order from this Commission enforcing Bell Atlantic's compliance with the Agreement. The language of the Agreement provides for compensation for the termination of all local traffic, including completion of local calls to Internet service providers. Cox, by counsel, respectfully petitions the Commission, in anticipation of Bell Atlantic's material breach of its Agreement with Cox, to enter an order declaring that local calls to Internet service providers constitute local traffic under the terms of the Agreement and that Cox and Bell Atlantic are entitled to reciprocal compensation for the completion of these calls.

In support of its petition, Cox states as follows:

I.

Background

1. The Agreement provides for reciprocal compensation for the transport and termination of local traffic as follows:

The Parties shall compensate each other for the *transport and termination of Local Traffic* in an equal and symmetrical manner at the rates provided in the Detailed Schedule of Itemized Charges (Exhibit A hereto). Until such time as the Commission adopts permanent rates consistent with the requirements of § 252(d) and applicable FCC Regulations established under § 251 of the Act, the rates set forth in Exhibit A shall be applied as interim rates as more fully described in Exhibit A and subsection 20.1.2 below. These rates (interim and permanent) are to be applied at the Cox-IP [Cox Interconnection Points] for traffic delivered by BA, and at the BA-IP [Bell Atlantic Interconnection Points] for traffic delivered by Cox. No additional charges, including port or transport charges, shall apply for the *termination of Local Traffic* delivered to the BA-IP or the Cox-IP, except as set forth in Exhibit A. When Local Traffic is terminated over the same trunks as Toll Traffic, any port or transport or other applicable access charges related to the Toll Traffic shall be prorated to be applied only to the Toll Traffic.⁴

2. The Agreement defines "Local Traffic" to mean:

traffic that is originated by a Customer⁵ of one Party on that Party's

Commercial Services, Inc. and Cox Fibernet Access Services, Inc. ("Agreement").

⁴ Agreement at § 5.7.2 (emphasis added).

network and terminates to a Customer of the other Party on that other Party's network, within a given local calling area, or expanded area service ("EAS") area, as defined in BA's effective Customer tariffs, or, if the Commission has defined local calling areas applicable to all LECs, then as so defined by the Commission."

3. The rates for the termination of Local Traffic, as shown in the Detailed Schedule of Itemized Charges, Exhibit A to the Agreement, are \$0.003 per minutes of use for Local Traffic delivered directly to the party's End Office,⁷ and \$0.005 per minute of use for Local Traffic delivered to a Tandem Office⁸ of a Serving Wire Center.⁹

4. The Agreement is the culmination of negotiations between the parties and arbitration by the Commission. From the very beginning of negotiations, both parties considered local calls to Internet service providers to be local traffic, eligible for reciprocal compensation for transport and termination. For example, Cox originally sought a bill-and-keep arrangement under which neither party would charge the other for transport and termination of local traffic. However, Cox made it

⁵ "Customer" is defined by § 1.16 of the Agreement to mean "a third-party residence or business end-user subscriber to Telecommunications Services provided by either of the Parties."

⁶ Agreement at § 1.45.

⁷ "End Office" is defined in § 1.9(a) of the Agreement to be "a switching entity that is used to terminate Customer station Loops for the purpose of interconnection to each other and to trunks."

⁸ "Tandem Office," as defined in § 1.9(b) of the Agreement, means "a switching entity that has billing and recording capabilities and is used to connect and switch trunk circuits between and among End Office Switches and between and among End Office Switches and carriers' aggregation points, points of termination, or points of presence, and to provide Switched Exchange Access Services."

⁹ "Serving Wire Center" or "Local Serving Wire Center" is defined in § 1.43 of the Agreement to mean "a Wire Center that (i) serves the area in which the other Party's or a third party's Wire Center, aggregation point, point of termination, or point of presence is located, or any Wire Center in the LATA in which the other Party's Wire Center, aggregation point, point of termination or point of presence is located in which the other Party has established a Collocation Arrangement or is purchasing an entrance facility, and (ii) has the necessary multiplexing capabilities for providing transport services." A "Wire Center" is defined in § 1.88 of the Agreement to mean "a building or portion thereof in which a Party has the exclusive right of occupancy and which serves as a Routing Point for Switched Exchange Access Services and is a location wherein trunks and exchange circuits which serve a defined geographic area converge. A Wire Center may consist of one or more switching offices. It is used as a point of interconnection

clear that if a reciprocal compensation regime were adopted, Cox would pursue Internet service providers and receive net compensation from Bell Atlantic. Cox understood Bell Atlantic to acknowledge this possibility, and to indicate that the issue of reciprocal compensation went well beyond its dealings with Cox.¹⁰

5. Bell Atlantic used this to its advantage in the arbitration proceedings. As explained in more detail below, when presenting its arbitration case to the Commission, Bell Atlantic's main argument against bill-and-keep was that terminating traffic would not be in balance between LECs. To support this argument, Bell Atlantic presented its own witnesses, and elicited testimony from the witnesses of other parties, that explicitly pointed to terminating traffic to Internet service providers, and to CLEC business plans to capture these customers, as a cause for imbalances in the termination of local traffic.

6. After receiving this testimony, the Commission rejected bill-and-keep and ordered the parties to implement a regime of reciprocal compensation for the transport and termination of local traffic. Specifically, the Commission found:

The Commission does not support the adoption of an interim bill-and-keep arrangement for transport and termination. Rather, the Commission adopts a proxy rate for BA-VA of \$.003 per minute for traffic terminated at the end office, the middle of the range proposed by the FCC. The proxy rate for traffic terminated at the tandem is \$.005 per minute. . . .

[T]he proxy rate for the termination of a BA-VA originated call on a CLEC's network should be set at BA-VA tandem interconnection rate of \$.005 per minute when the CLEC's switch serves a geographic area comparable to that served by a BA-VA tandem switch. To the extent that a CLEC's switch serves an area significantly smaller in geographic size than BA-VA's tandem switch, the CLEC should develop a means for estimating the terminating traffic usage on its network that would be a functional equivalent to end office termination and to tandem termination. . . .

as specified in FCC Docket No. 91-141, and rules adopted pursuant thereto.”

¹⁰ See, *Affidavit of Wes Neal, Cox Virginia Telcom, Inc.*, ¶¶ 4-6 (attached).

¹¹ *Id.* at ¶ 7.

[T]he BA-VA proxy rate of \$ 0.03 per minute for end office termination and \$ 0.05 per minute for tandem termination would apply to BA-VA traffic completed on a CLEC's network on this functional equivalent basis.¹²

7 Ironically, the traffic Bell Atlantic used to support its recommendation for the payment of reciprocal compensation for transport and termination, is now the very traffic it refuses to include for reciprocal compensation for transport and termination.

8 After the Commission's Arbitration Decisions, Cox continued to negotiate with Bell Atlantic to consummate an interconnection agreement (i) consistent with those issues it had settled prior to arbitration and (ii) consistent with the Commission's Arbitration Decisions. These negotiations consumed several weeks, principally, because Bell Atlantic insisted that a new Bell Atlantic draft agreement be used as the starting point rather than the draft agreement that existed between the parties prior to arbitration.

9 Throughout these latter negotiations, the issue of whether local calls to Internet service providers was never discussed.¹³ Indeed, Cox disclosed its business plans to Bell Atlantic, indicating that Cox anticipated high in-bound traffic volumes to its Internet service provider customers and that its forecasts included significant payments from Bell Atlantic to Cox for the transport and termination of local calls to Internet service providers.¹⁴ At no time did Bell Atlantic indicate that the classification of local calls to Internet service providers was an issue or that it now viewed such traffic as anything other than local.¹⁵ Furthermore, Bell Atlantic never

¹² *Petition of Cox Fibernet Commercial Services, Inc. For arbitration of unresolved issues from interconnection negotiations with Bell Atlantic-Virginia, Inc. pursuant to § 252 of the Telecommunications Act of 1996*, Order Setting Proxy Prices and Resolving Interim Number Portability, Case No. PUC960104, 4-5 (November 8, 1996)

¹³ *Affidavit of Wes Neal, Cox Virginia Telcom, Inc.*, ¶¶ 8-13.

¹⁴ *Id.*

¹⁵ *Id.*

proposed specific language that would have excluded transport and termination of local calls to Internet service providers from the payment of compensation.¹⁶

10 It was not until after the Agreement was signed by the Parties and approved by the Commission that Cox was given any indication that Bell Atlantic would try to avoid payment of compensation for the transport and termination of local calls to Internet service providers. First, Cox received word that Bell Atlantic-Pennsylvania, Inc. had notified Eastern TeleLogic Corporation by letter that it would no longer include traffic to Internet service providers in reciprocal local call compensation. Soon thereafter, Cox received a voice-mail message from Bell Atlantic indicating that, in its opinion, Cox was not entitled to compensation for the transport and termination of local calls to Internet service providers.

11 By letter dated May 22, 1997, Cox asked Bell Atlantic for clarification of its position.¹⁷ Bell Atlantic responded, by letter dated May 29, 1997, that its interpretation of the Agreement was that calls to Internet service providers did not meet the Agreement's definition for Local Traffic.¹⁸ The parties were unable to resolve the issue in subsequent negotiations. Therefore, Cox, pursuant to the dispute resolution provisions of the Agreement, brings this petition for enforcement to the Commission.

II.

Jurisdiction of the Commission

12 Enforcement of the Agreement is provided for by the Agreement. The Agreement's choice of law provision¹⁹ provides that "construction, interpretation and performance of this

¹⁶ *Id.*

¹⁷ See, letter to Warner F. Brundage, Jr., Esq. from Alexander F. Skirpan, Jr. dated May 22, 1997, provided as Attachment 1.

¹⁸ See, letter to Alexander F. Skirpan, Jr., Esq. from Warner F. Brundage, Jr. dated May 29, 1997, provided as Attachment 2.

¹⁹ Agreement at § 29.5.

Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia, except for its conflicts of laws provisions.” Furthermore, the dispute resolution provision²⁰ requires the parties first to enter into good faith negotiations.²¹ Should such negotiations fail to resolve the dispute in a reasonable time, either Party may initiate an appropriate action in any regulatory or judicial forum of competent jurisdiction.²² In this case, as explained above, negotiations have failed to resolve the dispute. Therefore, Cox seeks enforcement of the Agreement before the Commission, which, as explained below, is the forum of competent jurisdiction in the Commonwealth.

13. The Commission has broad authority to regulate the rates, charges, services, and facilities of LECs operating within the Commonwealth. This authority includes the power to enforce its lawful orders and to regulate interconnection terms and conditions of Virginia’s LECs.

14. For example, Article IX, § 2 of the Constitution of Virginia vests the Commission with the power and duty to regulate the “rates, charges, and services and . . . facilities of . . . telephone . . . companies.” Virginia Code § 12.1-13 provides that for “all matters within the jurisdiction of the Commission, it shall have the powers of a court of record . . . to enforce compliance with its lawful orders or requirements.” Virginia Code § 56-479 delineates the Commission’s interconnection responsibilities, requiring that the Commission “shall, from time to time, make and enforce such requirements, rules and regulations as in its judgment will promote efficiency of the [telephone] service to be rendered, and to that end may require physical connection to be made between two or more lines at such place and in such manner as in its judgment the public service requires.”

15. Commission enforcement of its Arbitration Decisions and the Agreement also is consistent

²⁰ *Id.* at § 29.9.

²¹ *Id.*

with the Telecommunications Act of 1996 ("Act").²² Section 252 of the Act provided the backdrop for the Commission's arbitration and approval of the final Agreement which is the subject of this petition. Nothing in this section, or in the Act for that matter, limits the Commission's authority to enforce its orders or agreements approved pursuant to this section.

III.

Virginia Rules of Contract Construction

16. Under § 29.5 of the Agreement, the parties agreed that the construction, interpretation and performance of the Agreement were to be governed and construed under Virginia law, except for its conflict of laws provisions. The only exception was that if federal law applies, that law would control. Application of Virginia rules of contract construction all point to one conclusion in this case -- the completion of local calls to Internet service providers is included in the reciprocal compensation regime.

17. In Virginia, "[a] well-settled principle of contract law dictates that where an agreement is complete on its face, and is plain and unambiguous in its terms, the court is not at liberty to search for its meaning beyond the instrument itself."²³ Moreover, "[a] contract is not deemed ambiguous merely because the parties disagree as to the meaning of the language they used to express their agreement."²⁴ Rather, the Supreme Court of Virginia has "defined 'ambiguity' as 'the condition of admitting of two or more meanings, of being understood in more than one way, or of referring to two or more things at the same time.'"²⁵

²² Pub.L. 104-104, 110 Stat. 56 *et seq.* (Feb. 8, 1996).

²³ *Ross v. Craw*, 231 Va. 206, 212, 343 S.E.2d 312, 316 (1986) (citing *Globe Company v. Bank of Boston*, 205 Va. 841, 848, 140 S.E.2d 629, 633 (1965)).

²⁴ *Ross*, 231 Va. at 212-13.

²⁵ *Management Enterprises, Inc. v. The Thorncroft Co.*, 243 Va. 469, 472, 416 S.E. 2d 229, 231 (1992) (citing *Berry v. Klinger*, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983)).

18 Applying this law to the present situation, the fact that Bell Atlantic may disagree as to the provisions of the Agreement does not make it ambiguous. In fact, as explained in detail below, the Agreement is plain in its terms that the completion of local calls to Internet service providers is included in the reciprocal compensation regime.

19 Even if Bell Atlantic were to persuade this Commission that the Agreement is susceptible to two interpretations relating to the treatment of local calls to Internet service providers, application of Virginia's rules regarding contract interpretation would yield the same result that Cox advocates. **First**, although negotiations between the parties prior to entering into a contract cannot be used to vary the terms, they can be used to determine the meaning and the intention of the parties. In *Bolling v. Hawthorne Coal and Coke Co.*, 197 Va. 554, 570, 90 S.E.2d 159, 170 (1955), the Court stated:

The preliminary negotiations between the parties and the meaning of the language used in connection with the surrounding facts and circumstances are to be considered not for varying or contradicting the plain terms of the instruments; but in order to determine the real meaning and intention of the makers of the instruments. In this consideration, the court, as nearly as possible, must place itself in the position of the parties in order to arrive at a proper construction of their contract.

20 Here, it was always the parties' understanding during the negotiations that local calls to Internet service providers constituted local traffic.²⁶ In this case, evidence of the parties' understanding during negotiations is provided by the record of the arbitration proceeding between Cox and Bell Atlantic. As will be explained below, in that proceeding, Bell Atlantic argued for a reciprocal compensation regime by pointing to imbalances in local traffic that would be caused by local calls to Internet service providers. At that time, Cox supported the use of bill-and-keep, rather than the payment of reciprocal compensation, as a way to minimize administrative costs and risks. However, both Cox and Bell Atlantic accepted the premise that local calls to Internet

²⁶ *Affidavit of Wes Neal, Cox Virginia Telcom, Inc.*, ¶¶ 4-13.